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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1038

CITY OF THOUSAND OAKS, CALIFORNIA,

Petitioner,

vs.

VAN NUYS PUBLISHING COMPANY, INC., a Corporation,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

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CITY OF THOUSAND OAKS, CALIFORNIA,

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vs.

VAN NUYS PUBLISHING COMPANY, INC., a Corporation,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

The petitioner, City of Thousand Oaks, California, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of California filed in this proceeding on October 18, 1971.

Opinion Below.

The opinion of the Supreme Court of California (Appendix A, *infra*, pp. 1-20) is reported in 5 Cal.3d 817. The opinion of the Court of Appeal of the State of California, Second Appellate District, Division 2, (Appendix B, *infra*, pp. 21-33) is reported in 14 Cal. App.3d 167. The findings of fact and conclusions of law made by the Superior Court of California for the County of Ventura, (Appendix C, *infra*, pp. 34-36) are unreported.

Jurisdiction.

The judgment and opinion of the California Supreme Court was filed on October 18, 1971. A timely motion for rehearing was denied on November 17, 1971, and this petition was filed within ninety (90) days of that date. (See Appendix D, *infra* p. 37.) This court's jurisdiction is invoked under 28 USC §1257 (3).

Questions Presented.

1. Can the City Council of the City of Thousand Oaks, at the insistence of its residents and property owners, regulate the indiscriminate scattering and distribution of printed advertising material on private property?

2. As an ordinance of the City of Thousand Oaks which regulates such littering and scattering of printed advertising material on private property by requiring prior consent of property owners or an adult resident or occupant an unreasonable restraint on freedom of speech and freedom of press or any other constitutionally protected freedoms?

3. Should the Supreme Court of California dictate to the City of Thousand Oaks the procedure it must use in the reasonable regulation of the distribution of advertising material when the procedure which the court suggests has been tried and found to be ineffective?

4. Are U.S. Supreme Court and Federal District Court decisions dealing with federal constitutional issues precedent that the Supreme Court of California must recognize and follow?

5. Must the Supreme Court of California interpret an ordinance of the City of Thousand Oaks in such a manner as to preserve its constitutionality?

Constitutional and Statutory Provisions Involved.

The Tenth Amendment to the Constitution of the United States provides as follows:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Article XI, Section 7 of the California Constitution provides as follows:

> "A county or city may make and enforce within its limits all local police, sanitary, and other ordinances and regulations not in conflict with general laws."

The First Amendment to the Constitution of the United States provides in pertinent part as follows:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

Section One of the *Fourteenth Amendment to the Constitution of the United States* provides in pertinent part as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . ."

Ordinances of the City of Thousand Oaks, California, No. 98, (Codified as Thousand Oaks Municipal Code §5-2.04, Volume 1, page 128):

> "Section 4: No person may throw, cast, distribute, scatter, deposit, pass out, give away, circulate or deliver any handbill, dodger, circular, newspaper, paper, booklet, poster, other printed matter or advertising literature of any kind in the yard or

grounds of any house, building structure, on any porch, doorstep or vestibule, in any public hallway, or upon any vacant lot or other private property without having first obtained permission of the owner or of an adult resident or occupant thereof." (Entire text of No. 98, of the Ordinances of the City of Thousand Oaks, California, is set out in Appendix D.)

Only Section 4 of the Ordinance 98 was attacked on appeal and the California Supreme Court dealt only with that section. The Supreme Court's order, however, was that the judgment be reversed. Judgment of the lower court had construed all of Ordinance 98 as being valid, enforceable, and constitutional, both in general and as applied to Van Nuys Publishing. While the holding of the California Supreme Court may have been broader than was intended, it is the above section which has application with regard to the respondent.

It has further been agreed and conceded by petitioner and respondent that Section 4 applies only to private property and not to private property which has unlimited public use, such as a shopping center.

Statement of the Case.

The petitioner, City of Thousand Oaks, California, is a municipal corporation located in Ventura County. The City of Thousand Oaks is located approximately twenty miles from the vast San Fernando Valley and Los Angeles with its large commercial area. It is a residential community with a population of about 45,000. A substantial portion of the residents of Thousand Oaks are employed and shop in the Los Angeles area. Thus Thousand Oaks becomes a fertile ground

for merchants attempting to attract business to Los Angeles and its surrounding communities. Most of the residents moved from dense urban areas to the Thousand Oaks area in order to enjoy the advantages of a community located in a semi-rural area. While the city is made up largely of housing tracts, it is located in a valley surrounded by rolling hills. During certain times of the year the area is subjected to strong easterly winds known as "Santanas." Unfortunately, as in many other areas, Thousand Oaks has experienced a growing number of residential burglaries in recent years.

The citizens of Thousand Oaks have been subjected to "throw away" publications which contain a modicum of news items and a disproportionate amount of advertising. These publications were distributed by throwing them on private property and the area was saturated with these on a regular basis.

Van Nuys Publishing Company, the respondent in this action, is a publisher in the San Fernando Valley of one such advertising publication, the "Valley News and Greensheet," distributed at regular intervals. Prior to the passage of Ordinance 98 citizens within the community of Thousand Oaks had attempted to stop the distribution of this publication to their homes by requesting the publisher to cease delivery. Such a method proved ineffective. While distribution to these residences would cease for a short period of time, it would resume without permission or request of the occupant or owner of the property. In this manner the Respondent maintained its high circulation figures for its advertisers.

The citizens of Thousand Oaks believe that the distribution of advertising material in this particular manner constitutes a nuisance and a detriment to the com-

munity. It has a particularly adverse effect in the accumulation of litter, making many of the residences unsightly. During those periods of time when the area was subjected to high winds the papers often come loose and blow helter skelter around the neighborhood. It has been the opinion of many police agencies that persons who wish to commit residential burglaries and vandalism use the accumulation of such freely distributed publications as an indication that a house is vulnerable to being broken into. The regular chore of removing the unwanted publications from the citizen's property constitutes a significant burden to that individual. If a citizen allows the publications to accumulate, his yard becomes unsightly. The accumulation of such litter has an adverse effect not only on the property upon which it has been placed, but also on the surrounding neighborhood.

At the urging of the citizens of the City of Thousand Oaks, the City Council formulated legislation to deal with this problem. The Council felt that a person who gave his permission would be sufficiently interested in those publications to make use of them and not to allow them to accumulate. On the other hand, allowing the materials to be distributed until a request to stop was made had proved ineffective in the past. As a result of the urging of its citizens, the City Council passed Ordinance No. 98. That ordinance became effective on or about August 18, 1966. Prior to the ordinance becoming effective, the respondent, Van Nuys Publishing Company, filed a complaint seeking to enjoin its enforcement. The request for injunctive relief was based on the ground that the enforcement of the ordinance would deny Van Nuys Publishing Company equal protection of the law and would also act as an

unlawful abridgment of freedom of the press and freedom of speech.

After a trial by the court, Judge Richard Heaton filed a judgment on July 9, 1969, denying the permanent injunction and declaring Ordinance 98 to be constitutional, both generally and as it applied to the Van Nuys Publishing Company. The Van Nuys Publishing Company appealed this decision to the California Court of Appeal. Although the original complaint attacked the entire ordinance, the appeals to both the California Supreme Court and the California Court of Appeal tested only the constitutionality of Section 4, the only section factually applicable to the Van Nuys Publishing Company. On January 8, 1971, the California Court of Appeal affirmed the finding of the lower court that the statute was constitutional. Upon the petition of Van Nuys Publishing Company the California Supreme Court granted a hearing to review the lower court's decision. On October 18, 1971, the California Supreme Court reversed the judgment of the lower court on the ground that Section 4 of Ordinance 98 was unconstitutional. The petitioner sought rehearing in that matter, which rehearing was denied on November 17, 1971.

REASONS FOR GRANTING THE WRIT.

1. The Decision of the California Supreme Court Directly Conflicts With Federal Decisions Dealing With This Type of Legislation.

The California Supreme Court specifically ruled that Section 4 of the Ordinance No. 98 was unconstitutional as being violative of the rights of freedom of speech and freedom of the press. In doing so, the Court failed to distinguish prior cases which dealt with ordinances similar to this.

In *Buxbom v. City of Riverside,* 29 F.Supp. 3 (D.C. S.D. Calif. 1939) the Federal District Court passed upon the constitutional validity of an identical provision. Section 5 of Ordinance No. 860 of the City of Riverside, California, read as follows:

> "Section 5: It should be unlawful for any person, firm or corporation, to throw, cast, distribute, deposit, scatter, pass out, give away, circulate or deliver any handbill, dodger, circular, newspaper, paper, booklet, poster, or any other printed matter or literature in the yard or grounds of any house, building, structure, or on any porch or doorstep or vestibule or in any public hallway thereof or upon any vacant lot or other private property without having first obtained permission of the owner, or of an adult resident or occupant thereof."

In *Buxbom* the Court found the statute to be constitutionally valid. That Court held that such an ordinance was not a burdensome restriction on the distribution of written material. It further held that some limitation as to the time and place of distribution of written material was permissible in order to prevent the

misuse or cluttering of public streets and private property. The Court's reasoning was based on previous decisions by the United States Supreme Court, including *Lovell v. City of Griffin, Ga.*, 303 U.S. 444 (1938). It is the Riverside ordinance which the City of Thousand Oaks used as a model in drafting its own legislation.

The California Supreme Court also failed to distinguish *Breard v. City of Alexandria, La.*, 341 U.S. 622 (1951). In that case the court was asked to determine the constitutionality of an ordinance which prohibited door-to-door canvassing without the prior consent of the homeowner who was to be contacted. The United States Supreme Court, held that such a statute was a reasonable exercise of police power and was a valid balancing between the *First Amendment* rights and the right of persons to enjoy the privacy of their own property. The statute was valid because it exercised no prior censorship of the material to be presented.

The ordinance in the instant case does not pass on the substance of any printed material, but merely regulates the procedure by which advertising material can be distributed.

2. The Decision of the California Supreme Court Conflicts With Constitutional Principles Set Forth in Prior Decisions Dealing With the First Amendment.

While freedom of speech and freedom of the press have always been given the most stringent of protection by the judiciary, it has long been held that these freedoms are not absolutes. While the court must foremost protect the individual rights to speak and publish freely, if these individual statements adversely affect

the majority, the court must balance these freedoms with the effect of their exercise. *Schenck v. United States,* 249 U.S. 47 (1919). On previous occasions the Supreme Court of the United States has sustained other ordinances which regulate but do not curtail the freedom of speech and press. *Kovacs v. Cooper,* 336 U.S. 77 (1949).

The California Supreme Court has violated this balancing principle by holding Section 4 of Ordinance 98 to be unconstitutional. The ordinance is not a denial of free speech. A city council has long had a right to speak for its citizens and to preserve and protect persons and property. *Breard v. City of Alexandria, La., supra,* 341 U.S. 622 (1951). The municipality's interest in regulation of things which affect the environment is a valid exercise of its police power. *Groeb v. Fox,* 274 U.S. 603 (1927). This ordinance does not thwart the distribution of printed matter, it simply gives to the intended recipient the right of refusal.

The California Supreme Court suggests that the City should adopt a procedure allowing those who do not wish to receive the material to be placed on a list which would be distributed to the publishers. While such a procedure is constitutionally valid, *Rowan v. Post Office Department,* 397 U.S. 728 (1970), it is certainly not exclusive, and may not be effective. To force such a procedure on a municipality would be to fall prey to the very evil Justice Frankfurter described when he said, "we should not, however, unwittingly slip into the judgment seat of legislatures," *Martin v. City of Struthers, Ohio,* 319 U.S. 141 (1943). The statute does not violate due process as set forth in the *Fourteenth Amendment to the United States Constitution.* The mere existence of the ordinance will be suf-

ficient prior warning that those individuals who wish to distribute such material in such a manner must first get permission. If such notice exists, subsequent regulation is not unconstitutional. *Breard v. City of Alexandria, La., supra*, 341 U.S. 622 (1951).

3. The California Supreme Court Erred in Not Construing the Ordinance in Such a Manner as to Preserve Its Constitutionality.

It is the position of the City of Thousand Oaks that the statute in question, Ordinance 98, applies only to advertising material. As in the case of *Valentine v. Chrestensen*, 316 U.S. 52 (1942), a governmental body may reasonably regulate the distribution of material which contains equal portions of advertising material and political statements. The City does not take the position that this statute need be applicable to publications which are primarily religious or political in nature. It has not been found that these types of publications create the same nuisances as those of materials which the City seeks to restrict. Most political and religious publications are not systematically distributed on a daily or a weekly basis as are the advertising publications, such as the Van Nuys publication.

It has long been recognized that legislation should be construed in such a manner as to insure that it is constitutionally valid. *United States v. Congress of Industrial Organizations*, 335 U.S. 106 (1948). This principle has been followed within the state of California. *In re Cox* (1971) 3 Cal.3d 937. The lower court in its opinion at page 20 (Appendix A) states that under normal circumstances it would follow this principle, however, since this ordinance deals with a *First Amendment* right, the mere presence of the ordinance endangers

the free distribution of ideas. Such temerity has not been evidenced in prior decisions made by the Supreme Court of the United States. On prior occasions, that court has narrowly construed statutes dealing with the *First Amendment* in order to preserve their constitutionality. *Kovacs v. Cooper, supra*, 336 U.S. 77 (1949); *Cox v. State of New Hampshire*, 312 U.S. 569 (1941).

As stated in *United States v. Congress of Industrial Organizations, supra:*

> "The obligation rests also upon this court in construing congressional enactments to take care to interpret them so as to avoid a danger of unconstitutionality." 68 S. Ct. 1349 at page 1356.

As pointed out by the dissenting opinion of the court below, the California Supreme Court can and must construe the ordinance in such a manner as to encompass both the legitimate objectives of the municipality and to protect the preservation of *First Amendment* rights.

4. The Decision in This Case Will Have an Impact in Areas Outside the Immediate Factual Situation Involved.

In passing Ordinance No. 98, the City of Thousand Oaks made the determination that the unsightly accumulation of litter was adverse to the best interest of the community. It is further accepted that the accumulation of such materials in residential areas are one of the signs that would-be burglars seek in choosing a house to victimize. The City of Thousand Oaks feels that it is protecting the best interests of the majority of the population and the beauty of its environment. The Supreme Court of California has denied the right of the majority of citizens to take reasonable and effective

measures in dealing with their best interests. It has ruled contrary to constitutional principles. This deviation sets a precedent which will affect all other municipalities and citizens within California, the most populous state in the Union. In constructing its ordinance, the City followed the principles of balancing set forth by prior court decisions. To allow the decision of the California Supreme Court to stand will be to allow the erosion of these principles.

The City of Thousand Oaks has attempted to deal with a very real problem. As the population expands and the advertisers seek to attract this population to purchase more products, the need for governmental regulation to protect our natural resources and rights of privacy and property will become more acute. Everywhere trash and litter accumulate; neither public nor private property is safe and free from this abuse. In the present context the question is presented in terms of rights of free speech in advertising literature. Certainly other municipalities will develop an interest in protecting their citizenry from the same nuisance. Already citizens face an avalanche of advertising in the mail; now in California the citizens face an avalanche of printed material in their front driveways, shrubs and flowers and who knows where else.

The impact of this question has its application in more areas than freedom of speech and press. The questions presented will have application to any area in which the municipality seeks to regulate a commercial interest for the good of its citizens and to maintain clean and litter-free private property to enhance the environment and the beauty of natural surroundings.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of California.

February 11, 1972.

Respectfully submitted,

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APPENDIX A.

Opinion of the Supreme Court of the State of California.

In the Supreme Court of the State of California, in Bank.

Van Nuys Publishing Company, Inc., Plaintiff and Appellant, v. City of Thousand Oaks, Defendant and Respondent. L.A. 29866, (Super. No. 49834).

Filed: Oct. 18, 1971

Plaintiff Van Nuys Publishing Company instituted this action to enjoin defendant City of Thousand Oaks from enforcing a newly enacted "anti-littering" ordinance on the ground that the provision, on its face and as applied, constituted an unconstitutional abridgement of First Amendment rights. After initially issuing a preliminary injunction as requested by plaintiff, the trial court rendered judgment in favor of the city, upholding the constitutionality of the challenged ordinance. The publisher appeals from that decision.

For the reasons discussed more fully below, we have concluded that the city's present, broadly phrased, anti-littering ordinance cannot be squared with established First Amendment precepts. Instead of drafting a narrow measure aimed specifically at those who litter or those who handle written materials irresponsibly so as to cause litter, the City of Thousand Oaks has, by the instant enactment, undertaken an extensive interference with the distribution and circulation of all types of written material; as such, the challenged provision unquestionably exhibits the familiar unconstitutional vice of "overbreadth," proscribing constitutionally protected

activity along with "littering." The past 30 years of First Amendment adjudication, in both the United States Supreme Court and in this court, teach that this ordinance, by broadly curtailing a predominant means of direct person-to-person and house-to-house distribution of written material, instead of fashioning its proscription precisely to the problem of littering, cannot withstand constitutional scrutiny.

Section 4 of city ordinance No. 98, the section attacked on this appeal,[1] provides in full: "No person may throw, cast, distribute, scatter, deposit, pass out, give away, circulate or deliver any handbill, dodger, circular, newspaper, paper, booklet, poster, other printed

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[1]Ordinance 98 is entitled "An Ordinance of the City of Thousand Oaks Declaring the Throwing or Distributing of Printed Matter on Public and Private Property Without Consent to be a Public Nuisance and Unlawful." It provides in full:

"The City Council of the City of Thousand Oaks does ordain as follows:

"SECTION 1. The City Council of the City of Thousand Oaks finds and determines that entire communities within the City and a considerable number of citizens are adversely affected by persons, without consent, throwing, casting, distributing, scattering and depositing handbills, dodgers, circulars, newspapers, booklets, posters, printed matter and advertising literature upon public and private property. These acts are declared to constitute a public nuisance.

"SECTION 2: No person may throw, cast, distribute, scatter, deposit or place upon any public place within the City, including but not limited to streets, alleys, public parks and school grounds, any handbill, dodger, circular, newspaper, paper, booklet, poster or any other printed matter or advertising literature of any kind; provided, however, the same may be personally delivered to those who are willing to accept the same.

"SECTION 3. No person may throw, distribute or place in or on any automobile or other vehicle in the City any handbill, dodger, circular, newspaper, paper, booklet, poster, or any other printed matter or advertising literature without

(This footnote is continued on next page)

matter or advertising literature of any kind in the yard or grounds of any house, building structure, on any porch, doorstep or vestibule, in any public hallway, or upon any vacant lot or other private property without having first obtained permission of the owner or of an adult resident or occupant thereof." Violators of this ordinance are guilty of a misdemeanor.

The problem of accumulating litter constitutes a major concern for many modern municipalities, and the City of Thousand Oaks' avowed goal in enacting the present legislation—the reduction of litter throughout the community—is, of course, a legitimate and, indeed an increasingly urgent, government objective. In attempting to achieve this unquestionably valid goal

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first having obtained permission of the owner or person in possession thereof.

"SECTION 4. No person may throw, cast, distribute, scatter, deposit, pass out, give away, circulate or deliver any handbill, dodger, circular, newspaper, paper, booklet, poster, other printed matter or advertising literature of any kind in the yard or grounds of any house, building structure, on any porch, doorstep or vestibule, in any public hallway, or upon any vacant lot or other private property without having first obtained permission of the owner or of an adult resident or occupant thereof.

"SECTION 5. If a section of this ordinance is invalid, all valid sections that are severable from the invalid section remains [sic] in effect. If a section of this ordinance is invalid in one or more of its applications, the section remains in effect in all valid applications that are severable from the invalid applications.

"SECTION 6. Any person violating any of the provisions of this ordinance shall be guilty of a misdemeanor and upon conviction thereof shall be punishable by a fine of not more than Five Hundred Dollars ($500.00) or by imprisonment in the county jail for a period of not more than six months, or by both such fine and imprisonment."

Only section 4 of the ordinance is attacked on this appeal and, therefore, we naturally confine our attention to this portion of the ordinance. For convenience, however, we shall hereinafter utilize the term "ordinance" and "section 4" interchangeably, unless otherwise specified.

through a broad proscription of the dissemination of written literature, however, the instant ordinance collides with the constitutionally enshrined rights of freedom of speech and press. Although recent cases have consistently warned of "the chilling effect upon the exercise of First Amendment freedoms generated by . . . [statutory] overbreadth" (Walker v. City of Birmingham (1967) 388 U.S. 307, 345 (Brennan, J. dissenting); see, e.g. Dombrowski v. Pfister (1965) 380 U.S. 479, 486-487), and have consequently admonished legislators that "[p]recision *of regulation must be the touchstone in an area so closely touching our most precious freedoms*" (NAACP v. Button (1963) 371 U.S. 415, 438), the present section adopts a "broad brush" solution to litter control and thereby discloses its complete insensitivity to the constitutional freedoms it endangers.

The right to "distribute," "pass out," "circulate," or otherwise disseminate ideas and written material has, of course, long been recognized to constitute an integral part of the right of free speech. "The right of free speech necessarily embodies the means used for its dissemination because the right is worthless in the absence of a meaningful method of expression . . . . The right to speak freely must encompass inherently the right to communicate; . . : it contemplates *effective* communication." (Wollam v. City of Palm Springs (1963) 59 Cal. 2d 276, 284; see, e.g., Martin v. City of Struthers (1943) 319 U.S. 141, 143 ("This freedom [of speech and press] embraces *the right to distribute literature,* [citation], and necessarily protects the right to receive it."); Lovell v. City of Griffin (1937) 303 U.S. 444, 452 (" '*Liberty of circulating is as essential to . . . freedom [of speech and press] as liberty of publish-*

ing; indeed, without the circulation, the publication would be of little value.' [citation]." (emphasis added).)

This right to distribute newspapers, pamphlets, or any protected material,[2] does not, of course, imply a constitutional right to litter. But the instant provision goes far beyond proscribing those activities which constitute littering or necessarily cause litter; in addition to proscribing the "throwing," "casting," or "scattering," i.e., "littering," of paper onto property without consent, the section goes on to prohibit *all* "distributing," "passing out," "giving away," "circulating," or "delivering" of such written material without a property owner's consent. Thus the ordinance does not limit its criminal sanction to those who strew papers on lawns or sidewalks, but by its terms covers those who merely enter on property to distribute pamphlets to others who may be there, as well as those who, in delivering pamphlets, take care to secure their messages so as to eliminate the hazards of litter.

Over 30 years ago in Schneider v. State (1939) 308 U.S. 147, the United States Supreme Court rejected as incompatible with the First Amendment a claim that a municipality could broadly curtail the dissemination of written literature in order to control litter, essentially the same proposition now unearthed by the City of Thousand Oaks. The *Schneider* court spoke in unam-

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[2]The instant ordinance is not confined solely to the distribution of commercial advertising, but, by its explicit terms, applies to the dissemination of "any handbill, dodger, circular, newspaper, paper, booklet, poster or advertising material," thus covering the distribution of constitutionally protected material. We thus have no occasion to pass on the validity of a statute which was so restricted. (Cf. Valentine v. Chrestensen (1942) 316 U.S. 52; Breard v. Alexandria (1951) 341 U.S. 622.)

biguous terms: "We are of the opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press. The constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw paper on the streets . . . [Par.] [T]he public convenience in respect of cleanliness of the streets does not justify an exertion of police power which invades the free communication of information and opinion secured by the Constitution." (308 U.S. at pp. 162-163.)

The city seeks to avoid the force of *Schneider's* broad constitutional pronouncement by emphasizing two distinctions between the provision at issue in this case and the provision invalidated in *Schneider*. First, the city suggests that whereas the *Schneider* ordinance barred the distribution of pamphlets and handbills on the public streets, assertedly the "traditional" grounds for exercising First Amendment rights, the instant ordinance applies only to distribution at private residences.[3] Second, the city points out that unlike the pro-

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[3]Although the language of section 4, covering distribution "on the grounds of any . . . building structure, . . . [in] any vestibule, . . . any public hallway, [and on] any vacant lot," by no means clearly excludes the ordinance's application to distribution on the grounds of public and quasi-public buildings, we need not determine the precise scope of the challenged ordinance since we have concluded that the enactment is in any event invalid even if limited only to distribution on private residential property.

vision invalidated in *Schneider*, the instant ordinance does not prohibit *all* distribution, but "merely" conditions distribution on the *prior* consent of the occupant of the property where distribution is to take place. The city contends that these differences mandate a different constitutional result than was reached in *Schneider*, but we cannot agree.

Although the public streets, parks and other public places have sometimes been characterized as the "traditional" grounds for the exercise of free expression (see, e.g., Hague v. C.I.O. (1939) 307 U.S. 496, 515-516), courts have long recognized that, in practice, house-to-house distribution of written material constitutes one of the principal means of implementing the First Amendment right of communication, and historically have afforded constitutional protection to such distribution. In a separate section of its decision in Schneider v. State (1939) 308 U.S. 147, 164, for example, after observing that ". . . pamphlets have proved most effective instruments in the dissemination of opinion," the court pointed out that ". . . perhaps the most effective way of bringing them to the notice of individuals is their *distribution at the homes of people*" (emphasis added). The court therefore invalidated, as incompatible with the First Amendment, a local ordinance which required house-to-house distributors of pamphlets to obtain a license prior to disseminating their material. "To require a censorship through license which makes impossible *the free and unhampered distribution of pamphlets* strikes at the very heart of the constitutional guarantees." (Emphasis added: 208 U.S. at p. 164. See also Lovell v. City of Griffin (1938) 303 U.S. 444; Cantwell v. Connecticut (1940) 310 U.S. 296.)

In Martin v. City of Struthers (1943) 319 U.S. 141, 145-146, the court developed the significant role fulfilled by house-to-house distribution of ideas. "The widespread use of this method of communication by many groups espousing various causes attests its major importance. . . . Many of our most widely established religious organizations have used this method of disseminating their doctrines, and laboring groups have used it in recruiting their members. The federal government, in its current war bond selling campaign, encourages groups of citizens to distribute advertisements and circulars from house to house. Of course, as every person acquainted with political life knows, door to door campaigning is one of the most accepted techniques of seeking popular support, while the circulation of nominating papers would be greatly handicapped if they could not be taken to the citizens in their homes. Door to door distribution of circulars is essential to the poorly financed causes of little people." (Footnotes omitted.)

Finding this "right to disseminate information door-to-door" substantially impaired by a local ordinance which forbade distributors of literature from ringing doorbells or sounding door knockers, the *Martin* court invalidated the provision as incompatible with the First Amendment. In Marsh v. Alabama (1946) 326 U.S. 501, 505, the court characterized its decision in *Martin* as holding broadly that "the preservation of a free society is so far dependent upon the right of each individual citizen to receive such literature as he himself might desire that a *municipality could not*, without jeopardizing that vital individual freedom, *prohibit door to door distribution of literature*." (Emphasis added.)

The city contends, however, that while these precedents may determine that it cannot constitutionally prohibit all house-to-house distribution of protected literature, the cases do not invalidate the instant ordinance, which does not ban all distribution, but "merely" conditions distribution on the prior consent of the occupant of the property where distribution is to take place. In the context of private residences, however, a requirement that a distributor obtain consent prior to the delivery of written material will, as a practical matter, frequently operate to curtail completely this means of communication. The present enactment does not restrict itself to persons who distribute matter on a regular basis, but applies also to those, such as local political candidates or neighborhood groups, who may distribute literature on only a single occasion. As to these distributors, section 4's "prior consent" requirement may well make canvassing prohibitively time-consuming and expensive, since successful communication will often requires repeated visits until the distributors find someone at the residence. In this day of rapidly increasing political campaign expenses, attributable to the great cost of television and other mass media advertising, house-to-house distribution of campaign literature remains one of the few available channels of communication open to the less-than-wealthy political candidate;[1] in practical terms, the instant ordinance

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[1]Justice Black's observation in Kovacs v. Cooper (1949) 336 U.S. 77, 103 (dissenting opinion) that an effective ban on the use of sound trucks would assure "preference in the dissemination of ideas . . . [to] those who have money enough to buy advertising from newspapers, radios or moving pictures" has even greater validity when applied to the practical curtailment of political canvassing.

would go far to eliminate such communication. This consequence, of course, inescapably collides with constitutionally enshrined rights.

The City urges, however, that while an individual may have a constitutional right to distribute material to *willing* recipients, he has no right to force his ideas on *unwilling* subjects. Relying heavily on Di Lorenzo v. City of Pacific Grove (1968) 260 Cal.App.2d 68, which upheld a similarly worded ordinance in the face of a constitutional attack, the defendant characterizes the instant ordinance's requirement of "prior consent" as doing no more than properly protecting the rights of unwilling "listeners." To support its approval of an analogous "prior consent" provision,[2] the *Di Lorenzo* court cited a passage from the United States Supreme Court decision of Kovacs v. Cooper (1949) 336 U.S. 77, 87, declaring: "The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be opportunity to win their attention."

Although *Di Lorenzo* stressed only the "willing listener" language of the above quotation, we believe that in so doing the Court of Appeal overlooked the principal thrust of the entire statement; in order for one to reach the minds of willing listeners, the *Kovacs* court recognized that the speaker, the disseminator of

[2]The ordinance at issue in *Di Lorenzo* provided: "It shall be unlawful for any person, firm, or corporation, or any agent or employee of any person, firm or corporation t othrow into, leave upon, or scatter onto any residential property in the City of Pacific Grove without the consent of the owner thereof or his agent, or the occupant of said private property any newspaper, handbill, pamphlet, circular, dodger, or any advertising sheet or matter devised or intended to promote any commercial or money-making activity."

ideas, must be given an "opportunity *to win their attention*." This object, of course, is all the distributor of pamphlets seeks to accomplish; "to win the attention," and perhaps ultimately "to reach the minds," of those willing to read the disseminated material. A principal vice of the instant ordinance is that it withdraws, as a matter of municipal policy, the possibility of communication between a distributor and those "willing" recipients who are not present to give personal consent to the delivery of distributed literature. (*Cf.* Martin v. City of Struthers (1943) 319 U.S. 141, 143-144.)

We do recognize, of course, that the state does have a legitimate interest in protecting individuals from having undesired material forced upon them, and, moreover, that this interest in personal privacy takes on special significance in the context of private residences. (See Rowan v. Post Office Department (1970) 397 U.S. 728, 736.) The instant ordinance, however, goes considerably beyond preserving a homeowner's individual choice, since it prohibits distribution to those occupants who have raised no objection to the material as well as to those who have. Instead of merely protecting the "unwilling listener," as the city contends, the present ordinance thus impairs a distributor's opportunity "to win the attention" of all uncommitted "listeners."

Furthermore, the city's professed goal of protecting "unwilling listeners" could be equally served by a more narrowly drawn provision, which simply prohibited a distributor from delivering material to any occupant who had expressed an objection to such distribution. Such an ordinance, placing the initial burden on the homeowner instead of the distributor, would not, in

effect, destroy First Amendment rights. Given the availability of this less restrictive alternative, we believe the present ordinance is unquestionably unconstitutional. (See e.g., Sherbert v. Verner (1963) 374 U.S. 398, 407; Fort v. Civil Service Com. (1964) 61 Cal.2d 331, 337.).

Several United States Supreme Court decisions support our conclusion that a proper accommodation of the competing First Amendment and privacy values at issue requires that the initial burden be placed on the homeowner to express his objection to the distribution of material. In Martin v. City of Struthers (1943) 319 U.S. 141, the court confronted a local ordinance which prohibited distributors of literature from ringing any doorbell or sounding any doorknocker, even though the homeowner had not expressed any objection to such communication. In invalidating the ordinance, the *Martin* court made clear that the provision's principal vice lay in its prohibition of communication when there had been no objection voiced by the householder.

The *Martin* court said, "Traditionally the American law punishes persons who enter onto the property of another *after having been warned by the owner to keep off*. . . . We know of no state which, as does the Struthers ordinance in effect, makes a person a criminal trespasser if he enters property of another for an innocent purpose without *an explicit command of the owner to stay away*. The National Institute of Municipal Law Officers has proposed a form of regulation to its member cities which would make it an offense for any person to ring the bell of a householder *who has appropriately indicated that he is unwilling to be*

disturbed. This *or any similar regulation* leaves the decision as to whether distributors of literature may lawfully call at a home where it belongs—with the homeowner himself. *A city can punish those who call at a home in defiance of the previously expressed will of the occupant.* . . ." (emphasis added; footnotes omitted). (319 U.S. at pp. 147-148).

More recently, in Rowan v. Post Office Department (1970) 397 U.S. 728, the court addressed a federal statute which established a procedure under which an individual, who received mail which he considered "erotically arousing or sexually provocative," could lodge his objection to such mail with the Post Office Department, which would then communicate the complaint to the sender of the material. The statute provided that after notice of the objection had been given, the sender could not continue to send such mail to the objecting householder; criminal penalties were provided for the violation of the prohibition. Several mailers attacked this statute on First Amendment grounds, claiming the provision violated their right to distribute literature. In rejecting this contention the court emphasized that, under the federal statute, distribution was barred only *after* the householder had first voiced his objection: "The Court has traditionally respected the right of a householder to bar, *by order or notice*, solicitors, hawkers and peddlers from his property. See Martin v. Struthers. . . . In this case the mailer's right to communicate is circumscribed only by the *affirmative act* of the addressee giving notice that he wishes no further mailings from that mailer." (Emphasis added) (397 U.S. at p. 737).

The teachings of *Martin* and *Rowan* establish sound guidelines for the formulation of regulations in this area. To preserve a homeowner's control over his "castle," a city may certainly prohibit a distributor from delivering matter "in defiance of the previously expressed will of the occupant" (Martin v. City of Struthers (1943) 319 U.S. 141, 148). The homeowner can, of course, express his objection to distribution in a variety of ways: he might, for example, post a sign on his property or, in the case of "regular" distributors, write or telephone the disseminator to instruct him to discontinue delivery. Alternatively, the city might adopt the *Rowan* procedure as a model, and establish a municipal office both to channel complaints to offending distributions and to monitor distributors' responses. The choice of method, of course remains with each municipality. A city cannot, however, preserve "privacy" (or attack "litter") by prohibiting all distribution without "prior consent," as the City of Thousand Oaks has attempted to do here.[6] The potentially devastating effect on First Amendment rights of such a provision necessitates that the city adopt a less restrictive alternative method to achieve its legitimate goals.

In sum, though attempting to meet the very real problem of accumulation of litter, the present penal enactment goes substantially beyond what is necessary to achieve the city's anti-lettering objective and, in so doing, treads directly on First Amendment rights. As the United States Supreme Court observed in Thornhill v. Alabama (1940) 310 U.S. 88, 97-98, there is a

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[6]Di Lorenzo v. City of Pacific Grove (1968) 260 Cal.App. 2d 68 is disapproved insofar as it is inconsistent with the views expressed above.

"pervasive threat inherent in [the] very existence . . . [of] a penal statute . . . which does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute . . . results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview."[7]

Thus, although in other contexts we would normally strive to construe the language of the ordinance narrowly to preserve its constitutionality, we believe that its "chilling effect" on sensitive First Amendment rights forecloses its rehabilitation and compels its demise as unconstitutional on its face. The very presence of the ordinance on the books endangers the free distribution of ideas. The would-be lay pamphleteer does not turn to court decisions to find a judicial interpretation of the ordinance; he reads the ordinance. Its cold words of absolute prohibition may stay his publication.

Only the stout-hearted will brave prosecution for the sake of publication. As the High Court observed in Dombrowski v. Pfister (1965) 380 U.S. 479, "If the rule were otherwise [than invalidating the statute as a whole], the contours of regulation would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution to determine

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[7] "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." (NAACP v. Button (1963) 371 U.S. 415, 432-433. See generally Note, *The First Amendment Overbreadth Doctrine* (1970) 83 Harv.L.Rev. 844.)

the proper scope of regulation." (Id. at p. 487.) "Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." (Id. at p. 486; see, e.g., United States v. Robel (1967) 389 U.S. 258, 266; Aptheker v. Secretary of State (1964) 328 U.S. 500, 514.)

The gravity of the dangers inherent in the instant ordinance is perhaps best appreciated through a brief glance back to our country's revolutionary beginnings. If the present law had been in force in eighteenth century America, the colonies may well have preserved the cleanliness of their streets only at the price of stilling the dissident voices of such pamphleteers as Thomas Paine, Andrew Eliot and John Carmichael.[8] Without the unique contribution of the political pamphlet,[9]

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[8]Thomas Paine, Common Sense (Philadelphia, 1776); Andrew Eliot, A Sermon Preached before His Excellency Francis Bernard (Boston 1765); John Carmichael, A Self-Defensive War Lawful (Lancaster, Mass., 1775). See generally *Pamphlets of the American Revolution* (Bailyn ed. 1965).

[9]The peculiar virtues of this medium of communication have been aptly described by George Orwell: "The pamphlet is a one-man show. One has complete freedom of expression, including, if one chooses, the freedom to be scurrilous, abusive and seditious; or, on the other hand, to be more detailed, serious and 'highbrow' than is ever possible in a newspaper or in most kinds of periodical. At the same time, since the pamphlet is always short and unbound, it can be produced much more quickly than a book and . . . can reach a bigger public. Above all, the pamphlet does not have to follow any prescribed pattern . . : All that is required of it is that it shall be topical, polemical and short." (George Orwell, Introduction in 1 British Pamphleteers 15. (Orwell & Reynolds eds. 1948).

our country's founders might have been deprived of *Common Sense's* vigorous call to "[S]tand forth! Every spot of the old work is overrun with oppression. Freedom hath been huted round the Globe. Asia and Africa have long expelled her. Europe regards her like a stranger, and England hath given her warning to depart. O! receive the fugitive, and prepare in time an asylum for mankind."[10]

The judgment is reversed.

Tobriner, *J.*

WE CONCUR:

Wright, *C. J.*
Peters, *J.*
Mosk, *J.*
Sullivan, *J.*

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[10]Thomas Paine, *Common Sense* (Philadelphia 1776) in 1 The Writings of Thomas Paine 100-101 (Conway ed. 1894-1896).

DISSENTING OPINION BY BURKE, J.

I dissent. It is a cardinal principle of constitutional law that if "the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution. [Citations.]" (San Francisco Unified School Dist. v. Johnson, 3 Cal.3d 937, 948 [Tobriner, J.].) Thus, in a recent case involving the constitutionality of a municipal trespass ordinance, we stated that "in order . . . to save the constitutionality of [the ordinance], we must construe it to encompass both the protection of the property owner's legitimate interest in preventing physical interference with the business use; disturbances of the peace . . . or physical obstruction of the premises . . . as well as the preservation of 'an effective place for the dissemination of ideas.' [Citation.]" (In re Cox, 3 Cal.3d 205, 223 [Tobriner, J.].)

In the instant case, the majority opinion facilely ignores the foregoing principles and declares City's anti-litter ordinance unconstitutional "on its face." In my view, we must (as in *Cox, supra*), construe that ordinance to encompass both the legitimate anti-litter objectives of the city and private property owner as well as the preservation of First Amendment rights. As so construed, the ordinance is valid and enforceable.

The majority claim that City's ordinance constitutes an "extensive interference" with the distribution of "protected" material, instead of being "aimed specifically at those who litter." To the contrary, properly construed to save its constitutionality, the ordinance is re-

stricted solely to those who litter, for it forbids only that distribution, scattering, etc., which occurs in private yards, grounds, porches, doorsteps, vestibules, hallways, vacant lots or other private property, without the owner's prior consent. By its terms, the ordinance *would* permit the direct distribution of "protected" or other material to any householder consenting to receive it, for the ordinance only applies to those "distributions" made "without having first obtained permission. . . ." Thus, nothing in the ordinance would prevent the distributor from announcing his presence and offering his handouts to the householder.

The cases cited by the majority indicate that an ordinance could not properly forbid *person-to-person* distribution on private property of protected material, such as religious tracts or political pamphlets. (See Schneider v. State, 308 U.S. 147, 164; Martin v. Struthers, 319 U.S. 141, 145-146.) These cases, however, would not bar a municipality from prohibiting the distribution of such material by scattering it on private grounds or leaving it on one's doorstep where, by its very presence, it could cause a serious litter problem as well as constituting an open invitation to burglary.

But even were we to conclude that these intrusions upon the private householder were justified by some need to afford the distributor of protected materials an uninvited access to private premises, we could nonetheless reasonably construe City's ordinance as applying only to nonprotected, commercial material, thereby saving the constitutionality of the ordinance in its most common application.

The authorities uniformly recognize that commercial soliciting or advertising may be regulated by ordinances of the type involved herein. (Breard v. City of Alexandria, La., 341 U.S. 622, 641-642; Schneider v. State, *supra*, 308 U.S. 147, 165.) Accordingly, it has been noted that "Ordinances prohibiting the distribution, throwing or casting of handbills, circulars, cards or other advertising matter upon streets and public places have been construed as applying only to commercial and business advertising matter. . . ." (7 McQuillan, Municipal Corporations, § 24.446, at pp. 430-431, citing cases.) City's ordinance could reasonably be so construed.

The majority accuse City's ordinance of exhibiting the vice of "overbreadth," a common form of legislative overreaction to the solution of a problem. Ironically, the majority, by declaring the ordinance invalid on its face without considering the reasonable alternative constructions which I have proposed, have overreacted in a similar manner. Accordingly, I respectfully dissent from their opinion.

Burke, *J.*

I concur:

McComb, *J.*

APPENDIX B.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

The Van Nuys Publishing Company, Incorporated, etc., Plaintiff and Appellant, vs. The City of Thousand Oaks, etc., Defendant and Respondent. 2d Civ. No. 35846.

Filed: Jan. 8, 1971.

APPEAL from a judgment of the Superior Court of Ventura County. Richard C. Heaton, Judge. Affirmed.

Willard R. Pool, for Plaintiff and Appellant.

Messrs. Hathaway, Clabaugh & Perrett, by E. E. Clabaugh, Jr., for Defendant and Respondent.

Plaintiff and appellant, Van Nuys Publishing Co., Inc. (hereinafter referred to as Publisher) sought to enjoin the City of Thousand Oaks (hereinafter referred to as the City) from enforcement of one of its ordinances on the grounds that the ordinance unconstitutionally abridged freedom of speech and press. The trial court found the ordinance to be "constitutional in general and as applied to plaintiff." and denied the injunction. Publisher appeals.

Publisher's newspaper "The Valley News and Green Sheet," is a newspaper of general circulation which contains local news and advertising as well as general information covering social, economic and religious subject matters. It is distributed in parts of Los Angeles and Ventura County.

Publisher's circulation in 1966 in the City of Thousand Oaks was 3500. Some of Publisher's papers were distributed free and some were distributed by way of subscription contracts. Publisher's circulation in Thousand Oaks was "controlled" in that Publisher knew where every copy was distributed. Finally, both non-subscription and subscription home deliveries were made by newsboys between the ages of eleven and fifteen.

In July 1966, City enacted Ordinance No. 98, to become effective on or about the 18th of August 1966.

Section 4 of the Ordinance reads as follows:[1]

"No person may throw, cast, distribute, scatter, deposit, pass out, give away, circulate or deliver any handbill, dodger, circular, newspaper, paper, booklet, poster, other printed matter or advertising literature of any kind in the yard or grounds of any house, building structure, on any porch, doorstep or vestibule, in any public hallway, or upon any vacant lot or other private property without having first obtained permission of the owner or of an adult resident or occupant thereof." Violation of this ordinance is made a misdemeanor.

Section 1 of Ordinance No. 98 serves as the City's preamble for the ordinance and declares that "The City Council of the City of Thousand Oaks finds and determines that entire communities within the City and a considerable number of citizens are adversely affected by persons, without consent, throwing, casting, distributing, scattering and depositing handbills, dodg-

[1] Although Publisher's complaint attacked the constitutionality of the entire ordinance, this appeal is directed solely to Section 4 of Ordinance No. 98.

ers, circulars, newspapers, booklets, posters, printed matter and advertising literature upon public and private property. These acts are declared to constitute a public nuisance."

On August 12, 1966, the Superior Court for the County of Ventura issued a preliminary injunction enjoining the enforcement of the ordinance against Publisher.

On November 7, 1967, the superior court rendered judgment in favor of Publisher and permanently enjoined City from enforcing Ordinance No. 98 against Publisher. Thereafter, City moved for a new trial. The court reopened the case on May 17, 1968, in lieu of granting a new trial. Finally, on March 14, 1969, the court reversed its previous position and ordered judgment for City, resting its decision on the authority of *Di Lorenzo v. City of Pacific Grove*, 260 Cal.App. 2d 68.

Publisher's attack on the City's ordinance raises two critical issues. First, Publisher argues that the section in question is not within the constitutionally permissible range of legislative regulation and impinges on Publisher's guaranteed rights of free speech and free press.

Second, ostensible distinctions between the language of the *Di Lorenzo* ordinance and the City's ordinance require consideration of whether City's ordinance is too broadly constructed and includes within its scope activities which cannot constitutionally be regulated. For reasons hereinafter noted we conclude that the stated purpose of Ordinance No. 98 is both legitimate and substantial and is not "pursued by means

that broadly stifle fundamental personal liberties." (*Shelton v. Tucker*, 364 U.S. 479, 488.)

The reported opinions of the appellate courts throughout this country contain a chronicle of numerous and colorful conflicts between municipal authorities and persons who contended that legislative enactments of the municipalities impinged upon their various constitutional freedoms.

We are called upon to examine once again the question of whether the actions of a municipal legislative body in seeking to protect its constituency against conduct which is apparently offensive to a majority has overstepped constitutional boundaries.

We agree with the trial judge in the instant case that the result reached in *Di Lorenzo, supra*, and the rationale supporting it are dispositive of the issue of municipal regulation of Publisher's activities.

The express purpose of Section 4 of the ordinance is to alleviate acts which were determined by City to constitute a public nuisance to "communities within the City and a considerable number of citizens . . ."

In *Di Lorenzo v. City of Pacific Grove, supra*, (where a similarly worded ordinance was held not violative of any constitutional provision) the City of Pacific Grove indicated its reason for enacting the ordinance was the need to prevent newspapers and advertising material from collecting on residential property. The ordinance's specific purpose was to protect residents who are unaware that such material was going to be thrown on their property and who are unable to make proper provisions for the stopping of such deliveries. The City of Pacific Grove determined that

such an ordinance was a reasonable regulation necessary to prevent burglaries which directly resulted from the notice of the absence of the owner provided to criminals by the accumulation of uncollected newspapers. In other words, the City of Pacific Grove sought to prevent burglaries and the City of Thousand Oaks seeks to prevent litter.

It is clear that while each city selected a different goal to be achieved by its ordinance, enforcement of either ordinance serves both goals and either stated objective is a proper matter for the exercise of the municipal police power.

On the other hand, if an ordinance is constitutionally defective the stated purpose of the City Council, however praiseworthy, would not save it.

The crucial issue before this court is whether Ordinance No. 98 wrongfully prohibits activity which enjoys a preferred status under both the United States and California Constitutions. The Supreme Court "has characterized the freedom of speech and that of the press as fundamental personal rights and liberties." (*Schneider v. Irvington*, 308 U.S. 147, 161.) (See also *De Jonge v. Oregon*, 299 U.S. 353; *Lovell v. City of Griffin*, 303 U.S. 444, 450; *Gitlow v. New York*, 268 U.S. 652.)

The court in *Schneider*, *supra*, at 161, underscored the importance of preventing the restriction of enjoyment of these liberties. The court therein set out the following constitutional admonition concerning legislative regulation of speech or the press: "In every case . . . where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere Legislative preferences

or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficent to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reason advanced in support of the regulation of the free enjoyment of the rights." (See also *Martin v. Struthers*, 319 U.S. 141, 144.)

Although freedom of speech and press are preferred rights which enjoy special constitutional protection, such protection will not deter reasonable and necessary regulation of such activities when it is shown that the purpose and effect of the regulation substantially outweighs the impingement on the exercise of these freedoms." (See *Wollam v. City of Palm Springs*, 59 Cal.2d 276, 285.)

Publisher correctly notes that its right to distribute and the homeowner's right to receive Publisher's papers are firmly embraced by the constitutional protection of speech and press and therefore Publisher's activities are deserving of the same protection afforded "pure speech." (*Martin, supra*, at 143.) Accordingly, Publisher contends that the Section 4 requirement of obtaining advance approval from the householder for the distribution of its newspapers directly abridges its right to free speech and press in that the ordinance is an over-reaching and onerous requirement which would in effect make it impossible for it to distribute its product.

It contends that the cost of third-class mail is prohibitive and that the ordinance in effect requires that prior to every delivery the newsboy would have to re-

quest permission to deliver the paper. This latter contention is predicated on the fact that the ordinance does not state that once approval by the householder is given, it is good until revoked.

An enactment of a legislative body carries with it a presumption of constitutionality. (See *Corning Hospital Dist. v. Superior Court*, 57 Cal.2d 488, 496; *Jersey Maid Milk Products Co. v. Brock*, 13 Cal.2d 620, 626.) In applying that presumption the courts are obliged to give to the legislation an interpretation which is reasonable and which will if possible support the constitutional presumption. (*In re Cregler*, 56 Cal. 2d 308, 310; *Warner v. Kenny*, 27 Cal.2d 627, 629.) It seems apparent to us that once having obtained an approval from a householder, the Publisher would not be required to obtain that approval on each and every delivery. We do not accept the Publisher's unreasonable interpretation of the ordinance.

The Publisher suggests also that the City could achieve its objective by placing the burden on the homeowner to notify the paper to stop distribution rather than unreasonably burdening the Publisher with seeking prior consent.

The trial court, however, found that in occasional cases residents of the City have requested that the unsolicited distribution of Publisher's newspaper be discontinued and that although in some instances distribution may be discontinued, subsequently and without request, the newspaper was again distributed in spite of the resident's request that Publisher discontinue the distribution. Publisher's suggested alternative then has apparently been tried and found unsatisfactory.

Beyond that, however, if the device adopted by the City to control the problem is constitutionally permissible it will not be rejected by the courts simply because there is an equally effective alternative available.

The City Council is entrusted by the citizens with the power to deal with the myriad of problems which arise in the municipality. The determination of the Council as to how to deal with these problems should not be interfered with by the court unless it is clearly and patently unconstitutional.

It is difficult to accept Publisher's contention that the impact of this ordinance will have such a devastating effect upon its ability to disseminate the newspaper when it admits in the pleadings that it already distributes some of the newspapers on subscription contract in the area.

Prior cases which have dealt with this general problem area contain a discernible common theme. In *Di Lorenzo*, at page 74, the court said: "In determining First Amendment rights a distinction is to be made between communications transmitted to *willing recipients* and messages forced upon those who do not wish to receive them. *Martin v. Struthers, supra*, pp. 146-147, comments upon the right to transmit information as follows: 'Freedom to distribute information to every citizen *wherever he desires to receive it* is so clearly vital to preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved.'" (Emphasis added.)

Kovacs v. Cooper, 336 U.S. 77, '87, makes the same distinction thusly: "The right of free speech is guaran-

teed every citizen that he may reach the minds of *willing listeners* and to do so there must be opportunity to win their attention." (Emphasis added.)

In *Buxbom v. City of Riverside*, 29 Fed.Supp. 3, pp. 6-7, the court said: "Freedom of the press is a part of that freedom of expression which includes free speech. The right to speak freely *does not imply* the right to *force one's speech on another's private premises* . . . no constitutional principle gives one the right to stand on my front lawn and deliver a speech to whomever may listen. . . . In like manner, the right to distribute literature and pamphlets does not imply the right to 'force' acceptance by placing them on another person's premises without his permission. . . . Nor is any constitutional norm violated when he who would spread literature or advertising on private premises is compelled to obtain the owner's consent. A man's home is still his castle."

In *Schneider, supra*, the United States Supreme Court struck down an ordinance of the City of Los Angeles which was designed to prevent litter. That ordinance prohibited the distribution of handbills and circulars on the public streets.

In holding that the purpose to keep the streets clean is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to *one willing to receive it*, the court noted however that the municipality was not deprived of all power to prevent littering, stating: "There are obvious methods of preventing littering. . . . [such as] punishment of those who actually throw papers on the streets." (Page 162.)

It is our opinion that the ordinance in question here is expressly mindful of the protection envisioned in *Martin* and *Schneider*, *supra*. The requirement that Publisher obtain the consent of a homeowner prior to the delivery of Publisher's paper protects the homeowner's right to receive welcome information or refuse undesirable litter without unreasonably abridging Publisher's right to write, print and distribute its thoughts and information. All the ordinance requires is that before casting the free copies of the newspapers onto the property, Publisher make contact with the householder and determine that he is *a person who is willing or desires to receive it*. Such contacts appear to represent no greater inconvenience than Publisher now "suffers" in seeking paid subscriptions for the same newspaper.

Finally, we would distinguish cases such as *Martin*, *supra*, wherein the court struck down an ordinance which forbade activities such as knocking on doors and ringing doorbells, for the purpose of distributing handbills.

Ordinance No. 98, unlike the *Martin* and *Schneider* ordinances, does not substitute the judgment of the community for the individual as to what speech or literature is to be digested. No license is required from the municipal authorities and the City does not undertake to pass judgment on who may distribute or what kind of literature may be distributed within the City.

As noted, the language of the *Di Lorenzo* ordinance differs slightly from Ordinance No. 98. Whereas the regulation in *Di Lorenzo*, *supra*, at p. 70, prohibits "any person . . . *to throw into, leave upon*, or *scatter onto* any residential property . . ." newspapers, hand-

bills, etc. without prior consent, Ordinance No. 98 denies any person the right to ". . . *throw, cast, distribute, scatter, deposit, pass out, give away, circulate,* or *deliver* . . ." newspapers, handbills, etc. without prior consent. It may be argued that, even if Publisher's activities here may be constitutionally regulated, this ordinance is overly broad in that it appears to prohibit other types of protected activity.

The Supreme Court has held that ". . . even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." (*Shelton v. Tucker*, 364 U.S. 479, 488; *Wollam, supra*, at p. 288.) However, no such conflict is presented in the instant case. City's ordinance appears to be reasonably and narrowly drawn in that Publisher is permitted to solicit consent from the householder and thereon distribute the newspaper to any householder who will accept it. Such words as "distribute," "pass out," or "circulate" may in a different context connote activities readily distinguishable from those activities described by "throw," "cast," "scatter," or "deposit." Certainly it is possible to "distribute," "pass out," or "circulate" material without littering. Thus, Ordinance No. 98 if so interpreted could become an unconstitutional regulation of protected activity. Such an interpretation, however, does violence to logic and the clear intention of the ordinance's language.

"It is elementary that, if possible, statutes will be so construed as to avoid absurd applications and to uphold their validity. [Citation.]' A statute 'will not be given an interpretation in conflict with its clear pur-

pose, and . . . general words used therein will be given a restricted meaning when reason and justice require it, rather than a literal meaning which would lead to an unjust and absurd consequence.'" (*In re Gregler, supra,* at 312, citing from *People v. Kelley,* 27 Cal.App. 2d Supp. 771, 774; *People v. Grubb,* 63 Cal.2d 614, 620.) "Where a statute contains a reasonably adequate disclosure of the legislative intent regarding an evil to be combatted in language giving fair notice of the practices to be avoided, a court will be slow to say that such a statute is too indefinite to be enforced. The complexities of the social problems dealt with by the [city council] require that a practical construction be given to the language employed by the draftsmen . . . lest their purposes be too easily nullified by overrefined inquiries into the meaning of words." (*People v. Deibert,* 117 Cal.App.2d 410, 418.)

The purpose of Ordinance No. 98 is clearly set out in its preamble and its legislative history had been clearly chronicled. The language of Ordinance No. 98 which gave Publisher fair warning of the practices which were to be avoided, must be interpreted in light of City's avowed purpose of preventing unsolicited litter. "The terms of the [ordinance] gain content and definition by reference to this purpose." (*People v. Grubb, supra,* at 620.) City's ordinance does not suffer from over-breadth. (*People v. McCaughan,* 49 Cal. 2d 409, 414.)

As we interpret the ordinance, it could not be applied to prohibit the depositing of newspapers, political or religious literature or other protected material in mail slots or similar types of receptacles in a manner which assures that the littering which the ordinance seeks to prevent, will not occur.

Our duty in this matter is not to pass upon the wisdom or desirability of the ordinance which the City has enacted. We must confine our attention to the question of whether or not the legislative body for the City has the constitutional power to do what it has done.

We conclude that City has the power to and does through its ordinance constitutionally regulate activities deemed by it to be a public nuisance.

For a consideration of the purpose, effect and circumstances surrounding the application of the ordinance to Publisher, we conclude as the court did in *Di Lorenzo, supra*, at p. 74, "[T]hat the ordinance in question has no First Amendment or other constitutional taint."

The judgment is affirmed.

Compton, *J.*

We concur:

Herndon, *Acting P. J.*

Fleming, *J.*

APPENDIX C.

Findings of Fact and Conclusions of Law and Judgment.

Superior Court of the State of California, for the County of Ventura.

The Van Nuys Publishing Company, Inc., a California corporation, Plaintiff, vs. The City of Thousand Oaks, et al., Defendants. No. 49834.

FILED: July 9, 1969.

After trial on September 15, 1968, during which oral and documentary evidence was introduced by plaintiff and defendant, City of Thousand Oaks, and defendant's subsequent motion for a new trial and upon oral argument the Court set aside its ruling and reopened the case for further proceedings and after submitting points and authorities the cause was again submitted.

The Court having considered the matter now makes its findings, conclusion and judgment as follows:

I.

FINDINGS OF FACT

1. That all the allegations of paragraphs I, II, IV, V, VI, VII and IX of the complaint are true.

2. That the allegations of paragraphs III, X, XI, XII, XIII, XIV and XV of the complaint are not true.

3. That the allegations of paragraph VIII of the complaint are not true in that in occasional cases residents of the City of Thousand Oaks have requested that the unsolicited distribution of plaintiff's newspaper be discontinued and that although in some instances distribution may be discontinued, subsequently and with-

out request the newspaper was again distributed in spite of the residents' request that plaintiff discontinue the distribution.

4. That the accumulation of unsolicited newspapers on public property, i.e., the streets of the City of Thousand Oaks, constituted a public nuisance.

5. That defendant, City of Thousand Oaks, is entitled to a declaration of this court declaring Ordinance No. 98 to be constitutional.

II.

CONCLUSIONS OF LAW

1. That Ordinance No. 98 of the City of Thousand Oaks does not deprive plaintiff of its property without due process of law, does not deny to plaintiff the equal protection of the law of the United States and the State of California and does not deprive plaintiff of its right of freedom of speech and is constitutional in general and as applied to plaintiff in the City of Thousand Oaks under the facts of this case.

2. That Ordinance No. 98 of the City of Thousand Oaks in general and as applied to plaintiff under the facts of this case is not in violation of the First Amendment of the United States Constitution, California Constitution and general laws of the State of California and is constitutional in general and as applied to plaintiff's newspaper in the City of Thousand Oaks.

3. That Sections 2, 3 and 4 of Ordinance No. 93 of the City of Thousand Oaks in general and as it applies to plaintiff under the facts of this case are not in violation of the First Amendment of the United States Constitution, the California Constitution and

general laws of the State of California and are constitutional as applied to plaintiff's newspaper in the City of Thousand Oaks.

4. That defendant, City of Thousand Oaks, its officers, agents, servants and employees, shall not be enjoined from enforcing or attempting to enforce Ordinance No. 98 against plaintiff.

III.

JUDGMENT

IT IS ORDERED, ADJUDGED AND DECREED:

1. That plaintiff take nothing by its complaint.

2. That Ordinance No. 98 of the City of Thousand Oaks is constitutional in general and as applied to plaintiff.

3. That Ordinance No. 98 of the City of Thousand Oaks is valid and enforeable.

4. That each party shall bear and pay its own costs of suit herein incurred.

Dated: July 9, 1969.

/s/ Richard C. Heaton
RICHARD C. HEATON
Judge of the Superior Court

APPENDIX D.

Order Denying Rehearing.

Order Due
November 17, 1971

In the Supreme Court of the State of California, In Bank. L.A. No. 29866.

The Van Nuys Publishing Company, Inc. v. City of Thousand Oaks.

FILED: Nov. 17, 1971.

Respondent's petition for rehearing DENIED.

McComb, J., and Burke, J., are of the opinion that the petition should be granted.

/s/ Wright
Chief Justice

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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-1038

CITY OF THOUSAND OAKS, CALIFORNIA,
Petitioner,

vs.

VAN NUYS PUBLISHING COMPANY, INC., a Corporation,
Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of the State of California.

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IN THE

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CITY OF THOUSAND OAKS, CALIFORNIA,

Petitioner,

vs.

VAN NUYS PUBLISHING COMPANY, INC., a Corporation;

Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of the State of California.

Statement of the Real and Only Question.

The "questions presented" in the petition herein do not really or directly arise in this cause; nor were they entertained or decided by the State Supreme Court. One, and only one question arose or was decided; and it is barely, almost casually mentioned in the petition. It dealt with the First Amendment right of free press; specifically, with the right to burden publication and free distribution of a newspaper.

The case deals with a newspaper of general circulation called "Valley News and Valley Green Sheet" which was distributed in Thousand Oaks, California. The trial court expressly found that it was a paper of gen-

eral circulation which carried "local news and intelligence of a general character and political, social, economic and religious information . . . [it] also contains advertising of local interest . . ." It has a circulation of 3500 in Thousand Oaks, all of which is controlled circulation in that the publisher knows where every copy is distributed; some of that circulation is distributed free; the rest of it because of subscription contracts. [See, *Petition*, Appendix B, pp. 21-22.]

So far as the free part of this distribution is concerned, the ordinance here involved requires, as a condition precedent to distribution, that there *first* be obtained the "permission of the owner or of an adult resident or occupant" of the premises to which delivery is made. [See, Thousand Oaks Ordinance, No. 98, sec. 4, *Petition*, pp. 3-4.]

The case in no way involves nor did the State Supreme Court entertain or decide the question of a city's constitutional power to enact a true "anti-littering ordinance." No doubt, the ordinance here involved went beyond publication and distribution of newspapers, and sought to deal with "littering" in the sense of the casting, deposit and scattering of handbills, dodgers, circulars and the like. But, it also dealt, specifically and expressly, with the distribution of newspapers *eo nomine* and imposed a prior restraint upon the free distribution of them. It was only with this express and deterrent application of the ordinance to newspapers that the decision below dealt. The question thus presented—and the only one decided—may be correctly stated in this way:

Is it an abridgement of or a prior restraint upon the First Amendment right of free press for a city to require, as a condition precedent to the free delivery of a newspaper to private premises, that there first be obtained the permission of the owner or of an adult resident or occupation of the premises?

The decision below against an ordinance so broadly phrased as to reach all newspaper distribution, regardless of the distributees' willingness or unwillingness to receive it, not based on any lack of power to prevent or control littering, nor even upon any lack of power reasonably and appropriately to regulate the distribution of media that come within the protection of the First Amendment. The basis of the decision made below was that this particular ordinance, *as applied to newspapers*, was overbroad, since it went further than it had to go to control or regulate littering. The decision is correctly and fully epitomized by this excerpt from the opinion of the State Supreme Court:

> ". . . The city's present broadly phrased, anti-littering ordinance cannot be squared with established First Amendment precepts. Instead of drafting a narrow measure aimed specifically at those who litter or those who handle written materials irresponsibly so as to cause litter, the City of Thousand Oaks has, by the instant enactment, undertaken an extensive interference with the distribution and circulation of all types of written material; as such the challenged provision unquestionably exhibits the familiar unconstitutional vice of 'overbreadth,' proscribing constitutionally protected activity along with 'littering.' . . ." [*Petition*, Appendix A, pp. 1-2.]

REASONS WHY THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT.

The question really raised is not new, nor has it been decided below in a way "probably not in accord with applicable decisions of this court." [See, Rule 19, 1, *Rules of the Supreme Court*, July 1, 1970.] To the contrary, the State Court's decision cleaves closely to the line of decision that this Court has marked out. The legal problem involved in the case has been often and thoroughly explored by this Court.

First: There is a marked distinction between commercial expression and that which, like a newspaper, is within the protection of the First Amendment. [See, and *cf.*, *Valentine v. Chrestensen*, 316 U.S. 52, 54, and *New York Times v. Sullivan*, 376 U.S. 254, 265-266.] The instant decision observes that distinction. It is only with the deterrent effect of the ordinance upon newspapers—media that are clearly within the protection of the First Amendment [see, *e.g.*, *Greenbelt Co-op. Pub. Assn. v. Bresler*, 398 U.S. 6, 11-12]—that this case deals. Insofar as the ordinance seeks to deal with other media and with what may properly be called "littering," it was left strictly alone by the State Supreme Court.

Second: Freedom of expression is a fundamental right. [*West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638.] That does not mean that it is amenable to no regulation; but, it does mean that regulation must be as narrowly confined as is consistent with attainment of some objective in which the State has a compelling interest. It is not enough that there be some rational relation between a legitimate objective and the means of regulation adopted by the State. [See, *e.g.*, *Thomas v. Collins*, 323 U.S. 516, 530;

West Virginia State Board of Education v. Barnette, supra, at 639; *Griswold v. Connecticut,* 391 U.S. 479, 497 (Goldberg J., concurring, joined by Warren, C.J., and Brennan, J.)[1] There must be narrow circumscription of the projected regulation.

Third: Of course, prevention of littering is a legitimate objective; and proscription of indiscriminate casting or throwing away of paper, whether printed or not, has a reasonable relation to that objective. But when the "paper" is of a kind to which the protection of the First Amendment extends, the means of prevention must be so limited as not to abridge the guaranteed right. This Court has made it clear that even when the State may have a compelling interest in preventing some grave abuse "it would plainly be incumbent upon the [state] to demonstrate that no alternative forms of regulation would combat such abuse and without infringing First Amendment rights . . ." [*Sherbert v. Verner,* 374 U.S. 398, 407. See, also: *Louisiana v. N.A.A.C.P.,* 366 U.S. 293, 296-297; *Talley v. California,* 362 U.S. 60, 63; *Schneider v. Irvington,* 308 U.S. 147, 164.]

That demonstration was not and cannot be made in respect of the Thousand Oaks ordinance. This Court itself, in cases like *Martin v. Struthers,* 319 U.S. 141, 148, and *Rowan v. United States Post Office Department,* 397 U.S. 728, 736-737, has pointed out the way to protect the recipient of unwanted publications.

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[1]California has given frequent and obedient application to this principle. [See, *e.g., City of Carmel-by-the-Sea v. Young,* 2 Cal. 3d 259, 268, 466 P. 2d 225, 85 Cal. Rptr. 1; *Weaver v. Jordan,* 64 Cal. 2d 235, 241, 411 P. 2d 289, 49 Cal. Rptr. 537, *cert. den.* 385 U.S. 844; *American Civil Liberties Union v. Board of Education,* 55 Cal. 2d 167, 178-179, 359 P. 2d 45, 10 Cal. Rptr. 647, *cert. den.,* 368 U.S. 819; *Katzev v. County of Los Angeles,* 52 Cal. 2d 360, 366, 341 P. 2d 310.]

without at the same time abridging free press.[2] That way is to proscribe distribution to those who make their unwillingness known.[3] Thus, the way for Thousand Oaks to accomplish its professed anti-littering objective was fully open in a direction that did not involve or require the limitation or suppression of any First Amendment right.

The difference between the way traveled by the Thousand Oaks ordinance and the way suggested by this Court [see, *Martin, supra*, 319 U.S. at 148] and actually adopted by the Congress in an analogous situation [see, *Rowan, supra*, 397 U.S. at 736-737] is, constitutionally speaking, a big one. The ordinance in suit effects a prior restraint by placing advance consent.[4] The other kind of ordinance puts the burden where it belongs—upon the person who does not want the publication. [See, *Martin v. City of Struthers, supra*, 319 U.S. at 148.]

Fourth: Because of the fundamental nature of the right of free press, it cannot be abridged unless there is a clear and present danger of some substantive evil which the State has the right to suppress. [*Dennis v. United States*, 341 U.S. 494, 503-504; *Thomas v. Collins*, 323 U.S. 516, 530; *Schneck v. United States*,

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[2]Freedom to publish, of course, includes freedom to distribute; for the right of publication is of little or no value unless what is published may be distributed or circulated. [See, *Talley v. California, supra*, 362 U.S. at 64; *Lovell v. City of Griffin*, 303 U.S. 444, 452; *Martin v. City of Struthers, supra*, 319 U.S. at 143.]

[3]Such unwillingness can be made known very easily or simply —by a sign or similar notice on the premises, or a statement of unwillingness mailed or otherwise communicated to the publisher.

[4]Having regard to changes in population and occupancy, it is obvious that compliance with the Thousand Oaks ordinance would require the publisher, in effect, to take frequent and repeated censuses of the entire community in which he desires to distribute his newspaper.

294 U.S. 47, 52.] The supposed evil here is "litter," but ". . . . [t]he privilege of [free press] may not be withdrawn even if it creates the minor nuisance for a community of cleaning litter from its streets . . ." [*Martin v. City of Struthers, supra,* 319 U.S. at 143; *cf., Schneider v. Irvington, supra,* 308 U.S. at 162.]

Actually, the danger in the instant circumstances is not clear or present. There will be only one paper at a time left at each premise. The great likelihood is that it will be picked up by the householder in his daily pick-up of his mail or subscription newspaper. Only a few, if any, of the free ones will be left adrift. The clear and present danger of some substantive evil that must be demonstrated must be "of a serious and substantive evil that rises far above public inconvenience, annoyance or unrest . . ." [*Terminello v. Chicago,* 337 U.S. 1, 4; *Cf., Tinker v. Des Moines Community School Dist.,* 393 U.S. 503, 509.] Nothing even beginning to approximate an evil of that magnitude was shown in the instant case.

Thus, we see that there is ample precedent from this Court for the decision made by the State Supreme Court. That decision comports with the decisions of this Court upon the subject. And the subject, important though it may be, has been repeatedly and thoroughly explored by this Court. There are other subjects, we deferentially suggest, not yet so comprehensively treated by this Court upon which its limited stock of time might better be spent.

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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